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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Supplementary reports of States parties due in 1992

Addendum

SPAIN*

[19 November 1992]

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* The initial report submitted by the Government of Spain is contained in document CAT/C/5/Add.21; for its consideration by the Committee, see documents CAT/C/SR.59 and 60 and Official Records of the General Assembly, Forty-sixth session, Supplement No. 46 (A/46/46), paras. 57-86).

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PART I

INFORMATION ON NEW MEASURES AND DEVELOPMENTS RELATING TO THE IMPLEMENTATION OF THE CONVENTION

A. Introduction

1. In accordance with article 19 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Kingdom of Spain presents its first supplementary report to the Committee against Torture. This report covers the period from November 1988 to November 1992; it follows the general guidelines adopted by the Committee at its sixth session (CAT/C/4/Rev.2).

2. The initial report of the Kingdom of Spain (CAT/C/5/Add.21) and its presentation to the Committee attested to the broad, extensive and detailed set of Spanish regulations for the protection of human rights. Spain's return to democracy in 1977 has made it possible, in the space of a few years, to establish a significant framework for the protection of human rights through the Constitution and the organizational and ordinary laws enacted subsequently. This first supplementary report will take the previous report as its starting-point and not reproduce the range of existing laws.

3. We will focus chiefly on the implementation and interpretation of existing legislation by the courts and we will also refer to the new provisions and instructions that have arisen in this field, with a view to improving the Spanish system for the protection of human rights, especially the right to physical integrity and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

B. Information concerning the articles in part I of the Convention

Article 1

4. Regarding the offence of torture as laid down in our criminal legislation, the operative regulation is article 204 bis of the Penal Code, paragraph 2 of which is reproduced in Organization Act 3/89 of 21 June and reads as follows:

> "Any authorities or public officials who, for the purpose of obtaining a confession or deposition in the course of a police or judicial investigation, commit any of the offences referred to in title VIII, chapters I and IV, and title XII, chapter VI, of this Code shall be liable to the penalty stipulated for each offence, in the maximum degree, as well as to specific disqualification.
>
> If, with the same intent, they commit any of the acts referred to in article 582 (2), the act shall be considered as an offence and the penalties of short-term imprisonment, in its minimum to medium degrees, and specific disqualification shall apply. When the act committed is among those referred to in article 585, it shall also be regarded as an offence and the penalties of brief imprisonment and suspension shall apply.

The same penalties shall apply, respectively, to prison authorities or staff who commit any of the acts referred to in the preceding paragraphs against detainees or prisoners.

Any authorities or public officials who, in the course of criminal proceedings or the investigation of an offence, subject a person being interrogated to conditions or procedures that intimidate him or cause him violence shall be liable to the penalty of brief imprisonment and specific disqualification.

The penalties laid down in the preceding paragraphs shall also be applied to authorities or officials whose remissness in their duty enables other persons to commit the acts referred to therein."

5. Title VIII (Offences against individuals), chapters I (Homicide) and IV (Injury), and title XII (Offences against liberty and security), chapter VI (Threats and coercion). Title III (Minor offences against individuals), articles 582 and 585.

6. The Committee is informed that a bill containing a new Penal Code is currently under discussion in the Congress of Deputies. The explanatory statement attached to the bill contains the following in reference to this offence:

"Some of these violations can theoretically be committed by private individuals (a private individual can conduct illegal wiretapping or house searches, for example); others are inconceivable (a private individual cannot conduct prior censorship or wrongfully hand over a prisoner). Acts that might be committed by either officials or private individuals follow the rationale that acts which are equal in theory are more heavily penalized if they are committed by private individuals. This is because, for all these offences, the basic idea is that the official is performing his duty, from which he deviates or which he exceeds, whereas if the act committed were completely outside his sphere of duties, it would have to be penalized as though it had been committed by a private individual. When the latter commits such an act, he is acting with absolute, not relative, unlawfulness. This basic idea can be seen, 'a contrario', in the fact that, of this group of offences that cannot be justified in any event, not even minimally speaking in the name of performance of duty, as is especially the case of torture, the penalty imposed is considerably more severe than that laid down for the same acts when committed by a private individual, and this is because, in such cases, the fact that performance of duty cannot be claimed means that advantage was taken of a situation of superiority with respect to the defencelessness of the detainee."

7. For its part, article 551 of the bill containing the new Penal Code, currently under discussion in Parliament, stipulates:

"1. Any authority or public officials who, for the purpose of obtaining a confession or deposition in the course of a police or judicial investigation, commit any of the offences referred to in titles I and III and in title VI, chapters II and III of this Code shall

be liable to the penalty stipulated for each offence, in the maximum degree, as well as to absolute disqualification for a period of 10 to 15 years.

2. If, with the same intent, they commit any of the acts referred to in article 597 of this Code, the act shall be considered as an offence and the penalties of imprisonment for 1 to 4 years and specific disqualification from public employment or office for 10 to 15 years shall apply. When the act committed is among those referred to in article 599 of this Code, it shall also be regarded as an offence and the penalties of imprisonment for 6 months to 2 years and specific disqualification from public employment or office for 4 to 10 years shall apply.

3. The same penalties shall apply, respectively, to authorities or staff of prisons or centres for the protection or reform of minors who commit any of the acts referred to in the preceding paragraphs against detainees, internees or prisoners.

4. Any authorities or public officials who, in the course of criminal proceedings or the investigation of an offence, subject a person being interrogated to conditions or procedures that intimidate him or cause him violence shall be liable to the penalty of imprisonment for 6 months to 2 years and specific disqualification from public employment or office for 10 to 15 years.

5. The penalties laid down in the preceding paragraphs shall also be applied to authorities or officials whose remissness in their duty enables other persons to commit the acts referred to therein."

8. A comparison of the two laws, the law in force and the proposed future law, indicates the following:

(a) The custodial penalty has been increased from brief imprisonment (one month and one day to six months) to imprisonment for six months to two years (para. 2).

(b) The penalty of disqualification has been adjusted and increased. In the Code in force, the penalty is "specific disqualification", which would allow a person convicted of torture to continue in public office in a different branch of the administration from the one to which he belonged when he committed the offence. In the bill currently under discussion in the Parliament, the disqualification is "absolute", i.e. such a person is debarred from any public function or office (consistent with the bill's guiding idea, since torture "cannot be justified, even minimally, in the name of performance of duty", and "in such cases, the fact that performance of duty cannot be claimed means that advantage was taken of a situation of superiority with respect to the defencelessness of the detainee". The duration of absolute disqualification is also increased.

(c) The term "torture" is used exclusively to mean this offence, which can only be committed by public officials. To that end, the expression "torture" has been deleted from article 421 of the Penal Code in force, where

it is mentioned as an aggravating circumstance in connection with the penalty for the offence of injury inflicted by private individuals.

(d) Article 551 (3) of the bill extends the application of the offence to authorities or officials of centres for the protection or reform of minors, which reflects efforts to ensure that the scope of this offence will cover all areas and situations in which it might arise.

9. As for the idea expressed by some members of the Committee when the initial report was presented, to the effect that Spanish legislation should contain a definition of torture that is more in keeping with the Convention, we would like to stress the reply given at that time:

(a) In addition to definitions "ad pedem litteram", the description of the offence of torture in the Spanish Penal Code undoubtedly and undeniably covers each and every one of the elements of torture as defined in the Convention.

(b) It will be recalled that the Convention forms part of the Spanish legal order, in accordance with article 97 of the Spanish Constitution, following the publication of the Convention in the Boletín Oficial del Estado on 9 November 1987 (art. 96 (1) of the Constitution: "Once validly concluded international treaties have been officially published in Spain, they shall form part of the domestic legal order. Their provisions may be repealed, amended or suspended only in the manner provided for in the treaties themselves or in accordance with the general rules of international law").

10. It should also be borne in mind that, in accordance with article 10 (2) of the Spanish Constitution, "Standards relating to fundamental rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain".

11. Finally, it should be emphasized that the standards in question are, of course, applied. Thus the judgement of the Constitutional Court dated 27 June 1990 states the following:

> "In this connection, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984 (ratified by Spain on 21 October 1987 and in force generally since 26 June 1987 and for Spain since 20 November 1987), defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (art. 1 (1)). The Convention also extends its guarantees to 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1'."

The Supreme Court judgement of 23 April 1990 also states:

> "Torture has been defined by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, meeting at Geneva on 1 September 1975, as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person, for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons'."

Article 2

12. Preventive action is one of the most effective ways of combating torture. Among the new measures adopted to prevent any form of torture, particular mention may be made of (a) the written information given to all inmates when they enter a penitentiary establishment - information which also exists in other languages; and (b) the radiological and/or medical examinations given to all persons suspected of carrying drugs. In order to avoid any type of unlawful aggression, these examinations can only be conducted with the reasoned authorization of an examining magistrate, and must always be carried out with due respect for human dignity (see State Attorney-General's instruction No. 6/1988).

13. A specific example of the application of these requirements is the Supreme Court judgement of 5 October 1989:

> "There is no doubt that these individuals, detained on mere suspicion, after a search of clothing in a doorway, which might have been justified in order to dispel suspicions on the spot and avoid the need to take them to a police station, were then subjected by the police officers to an additional search which, because it violated their privacy, should never have been conducted in a place of access to private property, and caused unjustifiable violence to the persons in question, as would have been caused to any resident who happened to arrive on the scene had the officers not blocked his access. This is indicative of harassment, and the officers violated the public trust when they exceeded their authority by using the place for such purposes, as there was no justification for employing such premises rather than a police station, i.e. suitable premises for such an examination, which, in any event, is not found to be effective in ruling out the rectal transport of drugs. The situation of the detainees was quite obviously humiliating and, by describing it as trivial, the court showed that it was willing to accept a degree of good faith on the part of the officers, which is not sufficient to exempt them from responsibility, and precisely requires immediate action to prevent such reprehensible practices from becoming widespread. Far from justifying the act, article 5 (1)(c) of the Security Forces Organization Act No. 2/1986 (para. 20) does the opposite, since in fact there was no serious, immediate and irreparable damage to excuse them and the methods used were not appropriate and proportional, as the regulations stipulate. It should be recalled that the same article recommends decent and careful treatment (para. 2 (b)) and respect for the dignity of those being detained (3 (b)). In addition, paragraph 3 (c) of the article stipulates

that legal procedures shall be observed when persons are detained. And the instruction issued on 12 December 1988 by the State Attorney-General repeats that judicial authorization is required in connection with searches for drugs in certain body cavities. The subjective aspect has to be deduced from the deliberate and conscious actions of the officers, and, naturally, it is sufficient to mention their intention to do what they did without any consideration for the feelings of the persons so treated; malicious intent for no other reason than to coerce and humiliate is not required."

14. Finally, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as a result of a periodic random selection, visited Spain in April 1991.

Article 3

15. With regard to the contents of this article, the following recent event attests to Spain's behaviour in this field: in the summer of 1992, nearly 100 persons of Central African origin, who were attempting to settle illegally in Spain, were prevented from entering Spanish territory (Melilla, North Africa). Since the Kingdom of Morocco refused them the right to enter and travel in Morocco, they remained outside but close to the Spanish frontier, on unshaded land, exposed to the sun. Three days after a complaint on this matter by a Spanish non-governmental organization was submitted to the European Commission of Human Rights, the Spanish Government, for humanitarian reasons and dispensing with legal formalities, received these persons in its territory in order to prevent them from suffering, and, once the serious humanitarian problem was resolved, proceeded to apply the legislation in force. The European Commission of Human Rights congratulated the Spanish Government on its rapid response.

Article 4

16. See commentary on article 1 (paras. 4-11). Regarding the prosecution of members of the State security forces, article 8 (1) of Organization Act No. 2/1986 of 13 May stipulates:

"The ordinary courts are competent to try offences committed against members of the security forces and offences committed by them in the performance of their duties.

When, after opening proceedings, the examining magistrates find that there is reasonable evidence of criminal behaviour by members of the security forces, they shall suspend proceedings and refer the case to the corresponding provincial court, which will be competent to continue the investigation, order a trial if necessary and render a judgement in the case.

When the act in question constitutes a minor offence, the examining magistrates will be competent to conduct the investigation and render the judgement, in conformity with the provisions of the Criminal Prosecution Act.

The preceding paragraphs do not apply to matters which fall within the purview of military jurisdiction."

17. This provision has been declared unconstitutional by the Constitutional Court judgement of 28 March 1990, which states: "Article 8 (1)(2) of the Security Forces Organization Act should be declared unconstitutional, being in contravention of the right to an impartial judge, since it assigns the investigation, trial and judgement of this type of offence to the same judicial body".

Articles 5, 6, 7, 8 and 9

18. No new developments.

Article 10

19. Human rights courses, especially concerning the prohibition against torture, continue to be taught in the training and continuing education centres of the State security forces, and are provided for all civil servants who might commit this offence, including doctors.

20. As for its application in practice, the teaching of human rights standards is not only carried out in vocational centres but is even referred to by the courts themselves, in response to the defence arguments of those convicted of torture. An example is the above-mentioned Supreme Court judgement of 5 October 1989.

Article 11

21. Although there is no formal code of ethics for the State security forces, the preamble to the Security Forces Organization Act No. 2/1986, following the approach taken by the Council of Europe in its "Declarations on Police Forces" and by the United Nations General Assembly in its Code of Conduct for Law Enforcement Officials, lays down some basic principles of behaviour which are mentioned in chapter II, article 5, and are becoming a veritable code of ethics, binding for all members of the State security forces.

22. Article 5:

"The following are basic principles of behaviour for the members of the State security forces:

1. Compliance with the legal order, especially:

(a) To perform their duties with absolute respect for the Constitution and all other provisions of the law.

(b) To act, in fulfilment of their functions, with strict political neutrality and impartiality, and therefore with no discrimination whatsoever on grounds of race, religion or opinion.

(c) To act with integrity and dignity. In particular, they must refrain from, and resolutely oppose, all acts of corruption.

(d) In their professional conduct, to follow the principles of rank and subordination. In no case shall due obedience apply to orders that involve the performance of acts that obviously constitute offences or violate the Constitution or the laws.

(e) To cooperate with the Justice Administration and assist it as provided for by law.

2. Relations with the community, especially:

(a) In the performance of their professional duties, to prevent any improper, arbitrary or discriminatory practice involving physical or moral violence.

(b) To observe at all times decent and careful behaviour in their relations with the public, whom they will try to assist and protect, where the circumstances make it advisable or necessary to do so. In all their actions, they shall supply as complete information as possible on the grounds and purpose of their actions.

(c) In the performance of their duties they shall act decisively and without delay in order to avoid serious, immediate and irreparable harm; in doing so they shall observe the principles of suitability, appropriateness and proportionality in using the means available to them.

(d) They must use firearms only in situations in which there is a reasonably serious risk to their own life or physical integrity or those of third persons or in circumstances which entail a serious danger to the security of citizens, and in conformity with the principles mentioned in the previous paragraph.

3. Treatment of detainees, especially:

(a) Members of the security forces must identify themselves properly when making an arrest.

(b) They shall look after the life and physical integrity of persons whom they arrest or who are in their custody and shall respect people's honour and dignity.

(c) They shall fulfil and observe with due diligence the procedures, time-limits and requirements established by law when a person is arrested.

4. Professional dedication:

They shall perform their duties with complete dedication, always acting in defence of the law and the safety of citizens, at all times and in all places, whether or not they are on duty.

5. Professional confidentiality:

They must keep strictly confidential any information they may acquire on account of, or in the course of, the performance of their duties. They shall not be required to reveal their sources of information except if the performance of their duties or the law requi that they should act otherwise.

6. Responsibility:

They are personally and directly responsible for acts committed i the performance of their duties which infringe or violate legal rules the regulations governing their profession and the principles set fort above, without prejudice to responsibility that might be incumbent on public administration for such rules and regulations."

Articles 12 and 13

23. Practical applications of these articles can be seen in judgements on t subject. Attached is a printout of all the judgements of the Supreme Court, Division 2 (or Criminal Division) (and of the Constitutional Court, as appropriate), from 1987 onwards, in which the term "torture" appears. Those judgements in which the offence is not one of torture, but where the expression is used inappropriately, in the ordinary or non-technical use of the term, should obviously be excluded. From the judgements actually referring to torture, it can be seen that the courts are accurately evaluati this offence.

24. Thus, for example, we have the above-mentioned Supreme Court judgement of 23 April 1990, which categorically rejects the possibility that the speci situation in which those convicted of torture found themselves can be considered a mitigating circumstance: "Reference should be made, says the judgement challenged, to the special psychological situation in which the accused found themselves when they performed the acts that have been declare proven. Now, the fact that any public official whatsoever, and we might add that this is even more applicable to those members of the State security forces who are entrusted with the extremely important task of investigating offences and finding the offenders, always ensuring the strictest and most scrupulous respect for basic individual rights and public freedoms, acts in violation of the criminal law, even if the dramatic circumstances in which they found themselves immediately before and at the time of the act cannot be disregarded or underestimated, does not mean that these can serve as mitigating circumstances. It is true that the atmosphere in which the questioning took place, in which 'six members of the Civil Guard, friends of the accused, had been murdered' and 'the victims' funerals had been held right in the Civil Guard Station' at the same time as the questioning, should have been avoided if possible, to avoid the tension existing during t questioning, when wisdom, balance and serenity should always prevail. Thus, as stated above, they may be used to graduate the penalty, but never as a circumstance mitigating criminal responsibility in the formal sense."

25. *We also consider the value judgement expressed by the court when tryin* these acts of torture to be absolutely correct. Thus, the Supreme Court

judgement of 24 February 1990 states: "An analysis of this offence (extremely serious not only because those who commit it are worthy of reproach but because their commission of this personal offence compromises the credibility of a democratic State under the rule of law) ...".

Article 14

26. One indication of how this article is being implemented is the ongoing "progressiveness and generosity required by the social realities of the moment", which the courts use in determining responsibility. As a matter of interest, the following is the Supreme Court judgement of 1 March 1990:

> "The subject of the sole reason for the appeal has been dealt with repeatedly by the divisions of this Court, with the progressiveness and generosity required by the social realities of the moment, and this favourable interpretation of article 22 of the Penal Code, which the petitioner claims was inappropriately applied, includes cases in which the perpetrator of the offence acted in the service of or for the benefit of his chief, including any abuses, excesses or inappropriate exercise of the tasks entrusted to him, provided that they are related to the performance of a service or obligation within the sphere of the administrative, contractual or employment relationship, excluding from responsibility all action located outside such relationships and not part of the work or function performed, or, when in the framework of such functions, following an explicit prohibition by the alleged perpetrator and failure to obey his orders. According to the record of the case, the accused behaved in the way he did on learning from his lover that she had been sexually assaulted by the person who was later murdered. The accused immediately took steps to detain him and did so, using his service revolver, which he was wearing in his capacity as municipal police chief on duty, while making it clear that he was acting in that capacity and showing his badge at the request of the detainee; once the arrest was made and without reading him his constitutional rights, the statement continues, he handcuffed him with his hands behind his back, took him to the municipal police post on the premises of the town hall (to which he had the keys because of his position), and, after asking two officers on duty to leave, took the detainee into a cell, where he was beaten, tormented and, finally, shot and killed with the weapon referred to earlier. As can be inferred from the brief account given above, these events involved a very serious abuse of the functions in question, and it cannot be claimed that this conduct was outside the scope of those functions, because if the capacity of the accused as chief of the municipal police is disregarded in this case, the event would not have had the outcome it did. This conclusion is so obvious that, after a detailed examination of the circumstances modifying criminal responsibility, the judgement had to find that using the public nature of his post was an aggravating circumstance under article 10 (10) of the Penal Code. Ultimately, in accordance with the findings of case law interpreting article 22 of the Penal Code, the verdict of civil responsibility in the second degree should be maintained, which is not to say that the event did not involve vile motives of vengeance or punishment that were used, whether or not the Court's ruling, which has not been appealed against, was well-founded, to clear the accused of the

charge of torture and to move the illegal detention from the purview of article 184 of the Penal Code to that of article 480 of the Penal Code."

In this case the compensation awarded amounted to Ptas. 15 million, which, in case of insolvency, will be met by the municipality.

Article 15

27. It should be borne in mind that, not only is a statement made under torture an offence in Spain, and it is therefore not possible to use it in a trial because it is unlawfully obtained evidence, but a statement made to the police is not, in and of itself, authentic evidence. The Constitutional Court highlighted this fact in its judgement of 15 April 1991:

> "It should be pointed out, as this Court has found repeatedly in previous cases, that although the only evidence considered to be authentic and binding on the criminal justice bodies when handing down a judgement is evidence given at the trial, this rule should not be interpreted so radically as to negate all evidentiary effect of police and pre-trial proceedings conducted according to the procedure laid down in the Constitution and the laws, provided they are reproduced at the trial under conditions enabling the defence counsel to challenge them (Constitutional Court judgements 80/88, 201/89, 217/89 and 161/90). It now remains to be seen whether the statements made on police premises by the petitioners - incriminating them beyond a doubt, in that they contained admissions of having committed the offences - should or should not be given evidentiary effect, since subsequent statements made at the hearing contain no denial of their evidentiary nature. When the above-mentioned criterion, laid down in the Constitution, is applied, the conclusion must necessarily be affirmative, since the record indicates that the initial statements were reproduced at the hearing under conditions enabling the defence counsel not only to become thoroughly familiar with them but also to challenge them. Thus, as stated in Constitutional Court judgement 169/90, 'the decisive factor [for granting evidentiary effect to the above-mentioned proceedings] is that anyone who makes statements in the written proceedings of the hearing that are in contradiction with what he stated at the investigatory stage should be given an effective opportunity to explain the differences'. In this case this requirement was strictly observed, since the Division did not simply provide a general and routine reproduction of the original statements, but the record of the proceedings shows that each of the defendants was questioned on the specific and detailed contents of his statements to the police; the defendants used this opportunity to deny their original statements and allege that the statements in question were made under pressure and torture. This allegation of torture, which had not been made before either by the defendant or the defence counsel present at the police proceedings, cannot be taken into account by this Court in order to invalidate the statements".

Article 16

28. No new developments.

C. Additional information

29. To provide the Committee with fuller and more accurate information, in accordance with data from the Office of the State Attorney-General, in the last four years "there were a total of 84 cases in which proceedings were brought on grounds of torture, of which 54 were filed because the facts were not found to constitute an offence. Of the 30 remaining cases, 26 are currently being processed, pending the completion of various steps, and 4 have resulted in final judgements, of which 3 were convictions and 1 an acquittal".

PART II

INFORMATION REQUESTED BY THE COMMITTEE

30. The information requested by the Committee was conveyed to it within days of the presentation of the initial report.

Annex

List of documents available in Spanish for consultation in the files of the Centre for Human Rights

1. Spanish Constitution.

2. Information provided to inmates when they enter a prison establishment.

3. State Attorney-General's instruction No. 6/1988.

4. European Commission of Human Rights. Billy Mark affair and others.

5. Printout of Supreme Court and Constitutional Court judgements in which the term "torture" appears.